

# MAINE STATE LEGISLATURE

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# 128th MAINE LEGISLATURE

## SECOND REGULAR SESSION-2018

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Legislative Document

No. 1768

S.P. 655

In Senate, January 3, 2018

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**An Act To Reduce Impairment on the Job and Improve Workplace  
Safety by Amending the Laws Governing Employment Practices  
Concerning Substance Use Testing**

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Submitted by the Department of Labor pursuant to Joint Rule 203.  
Reference to the Committee on Labor, Commerce, Research and Economic Development  
suggested and ordered printed.

A handwritten signature in cursive script, reading "Heather J.R. Priest".

HEATHER J.R. PRIEST  
Secretary of the Senate

Presented by Senator VOLK of Cumberland.  
Cosponsored by Senators: BRAKEY of Androscoggin, LANGLEY of Hancock,  
Representatives: ESPLING of New Gloucester, VACHON of Scarborough.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 26 MRSA §681**, as amended by PL 2011, c. 196, §1, is further amended to  
3 read:

4 **§681. Purpose; applicability**

5 **1. Purpose.** This subchapter is intended to:

6 A. Protect the privacy rights of individual employees in the State from undue  
7 invasion by employers through the use of substance ~~abuse~~ use tests while allowing  
8 the use of tests when the employer has a compelling reason to administer a test;

9 B. Ensure that, when substance ~~abuse~~ use tests are used, proper test procedures are  
10 employed to protect the privacy rights of employees and applicants and to achieve  
11 reliable and accurate results;

12 C. ~~Ensure that~~ Provide an employee with a substance abuse problem ~~receives~~ an  
13 opportunity for ~~rehabilitation and treatment of the disease and returns~~ and to return to  
14 work as quickly as possible; ~~and~~

15 D. Eliminate drug use in the workplace;

16 E. Protect workers from injuries and illnesses caused by impairment in the  
17 workplace; and

18 F. Provide the State with reliable data regarding the prevalence of substance use in  
19 the State's workforce in order to inform employment, workplace safety, rehabilitation  
20 and substance abuse policy.

21 **2. Employer discretion.** This subchapter does not require or encourage employers  
22 to conduct substance ~~abuse~~ use testing of employees or applicants. An employer who  
23 chooses to conduct such testing is limited by this subchapter, but may establish policies  
24 ~~which~~ that are supplemental to and not inconsistent with this subchapter.

25 **3. Collective bargaining agreements.** This subchapter does not prevent the  
26 negotiation of collective bargaining agreements that provide greater protection to  
27 employees or applicants than is provided by this subchapter.

28 A labor organization with a collective bargaining agreement effective in the State may  
29 conduct a program of substance ~~abuse~~ use testing of its members. The program may  
30 include testing of new members and periodic testing of all members. It may not include  
31 random testing of members. The program may be voluntary. The results may not be  
32 used to preclude referral to a job where testing is not required or to otherwise discipline a  
33 member. Sample collection and testing must be done in accordance with this subchapter.  
34 Approval of the Department of Labor is not required.

35 **4. Home rule authority preempted.** ~~No~~ A municipality may not enact any  
36 ordinance under its home rule authority regulating an employer's use of substance ~~abuse~~  
37 use tests.

1           **5. Contracts for work out of State.** All employment contracts subject to the laws  
2 of this State ~~shall~~ must include an agreement that this subchapter will apply to any  
3 employer who hires employees to work outside the State.

4           **6. Medical examinations.** This subchapter does not prevent an employer from  
5 requiring or performing medical examinations of employees or applicants or from  
6 conducting medical screenings to monitor exposure to toxic or other harmful substances  
7 in the workplace, ~~provided that as long as~~ these examinations are not used to avoid the  
8 restrictions of this subchapter. ~~No such~~ An examination may not include the use of any  
9 substance ~~abuse~~ use test except in compliance with this subchapter.

10           **7. Other discipline unaffected.** This subchapter does not prevent an employer from  
11 establishing rules related to the possession or use of substances of abuse by employees,  
12 including convictions for drug-related offenses, and taking action based upon a violation  
13 of any of those rules, except when a substance ~~abuse~~ use test is required, requested or  
14 suggested by the employer or used as the basis for any disciplinary action.

15           ~~**8. Nuclear power plants; federal law.** The following limitations apply to the~~  
16 ~~application of this subchapter.~~

17           ~~A. This subchapter does not apply to nuclear electrical generating facilities and their~~  
18 ~~employees, including independent contractors and employees of independent~~  
19 ~~contractors who are working at nuclear electrical generating facilities.~~

20           ~~C. This subchapter does not apply to any employer subject to a federally mandated~~  
21 ~~drug and alcohol testing program, including, but not limited to, testing mandated by~~  
22 ~~the federal Omnibus Transportation Employee Testing Act of 1991, Public Law 102-~~  
23 ~~143, Title V, and its employees, including independent contractors and employees of~~  
24 ~~independent contractors who are working for or at the facilities of an employer who~~  
25 ~~is subject to such a federally mandated drug and alcohol testing program.~~

26           **10. Federally mandated drug and alcohol testing programs.** The following  
27 limitations apply to the application of this subchapter.

28           A. This subchapter does not apply to an employee, an independent contractor or an  
29 employee of an independent contractor who is working for or at the facilities of an  
30 employer who is subject to a federally mandated drug and alcohol testing program.

31           B. An employer with employees in this State who are subject to a federally mandated  
32 drug and alcohol testing program either may follow a substance use testing policy  
33 established in accordance with this subchapter or may choose not to follow this  
34 subchapter for substance use testing of employees who are not subject to federal  
35 testing requirements, in which case the employer shall:

36                   (1) Prepare a substance use testing plan for employees who are not federally  
37 regulated and provide a copy of that plan to employees and the Bureau of Labor  
38 Standards prior to testing. The plan must identify the kinds of testing to be  
39 administered, notification and administration procedures and how confirmed  
40 positive test results that may be allowable under state law but not federal law will  
41 be handled for the employees who are not federally regulated. The plan must  
42 describe a process to ensure, at a minimum, that provisions of 49 Code of Federal

1 Regulations, Part 40, Subpart O will be followed to allow employees who are not  
2 federally regulated and who test positive the opportunity to contact and work  
3 with substance abuse professionals in evaluation, treatment and return-to-duty  
4 processes; and

5 (2) Follow corresponding federal notification provisions and procedural  
6 protocols for employees who are not federally regulated and comply with section  
7 683, subsection 8, paragraph D in reporting annually the results of substance use  
8 testing of such employees.

9 **Sec. 2. 26 MRSA §682, sub-§1-A** is enacted to read:

10 **1-A. Arbitrary testing.** "Arbitrary testing" means substance use testing in which  
11 the frequency of testing and the selection of those persons being tested are based on a set  
12 event, including, but not limited to, an employment anniversary or promotion, or are  
13 based on client-required or site-specific testing, such as when a client requires testing  
14 prior to work on a project or specific site.

15 **Sec. 3. 26 MRSA §682, sub-§2,** as amended by PL 1995, c. 324, §3, is further  
16 amended to read:

17 **2. Employee.** "Employee" means a person who is permitted, required or directed by  
18 any employer to engage in any employment for consideration of direct gain or profit. A  
19 person separated from employment while receiving a mandated benefit from the  
20 employer, including but not limited to workers' compensation, unemployment  
21 compensation and family medical leave, is an employee for the period the person receives  
22 the benefit and for a minimum of 30 days beyond the termination of the benefit. A  
23 person separated from employment while receiving a nonmandated benefit is an  
24 employee for a minimum of 30 days beyond the separation A person who has been  
25 temporarily laid off and is filing for unemployment benefits but who has a definite recall  
26 date within 6 weeks of the date of the initial layoff or who is receiving workers'  
27 compensation benefits and has not yet been released to return to work by an authorizing  
28 medical provider is considered to be an employee for the purpose of substance use  
29 testing.

30 A. A full-time employee is an employee who customarily works ~~30~~ 36 hours or more  
31 each week.

32 **Sec. 4. 26 MRSA §682, sub-§3-A,** as enacted by PL 1989, c. 832, §4, is amended  
33 to read:

34 **3-A. Medically disqualified.** "Medically disqualified" means that an employee is  
35 prohibited by a federal law or regulation, or any rules adopted by the State's Department  
36 of Public Safety that incorporate any federal laws or regulations related to substance  
37 abuse use testing for motor carriers, from continuing in the employee's former  
38 employment position due to the result of a substance abuse use test conducted under the  
39 federal law or regulation or the Department of Public Safety rule.

40 **Sec. 5. 26 MRSA §682, sub-§§3-B to 3-E** are enacted to read:

1           **3-B. Established drug-free workplace policy.** "Established drug-free workplace  
2           policy" means a substance use policy adopted by an employer that has certified to the  
3           Department of Labor that all affected employees have been notified of the policy and  
4           have had an opportunity to review the policy and its requirements.

5           **3-C. Fitness-for-duty evaluation.** "Fitness-for-duty evaluation" means an  
6           evaluation to determine whether an employee is in a physical, mental and emotional state  
7           to perform the essential tasks of that employee's work assignment in a manner that does  
8           not threaten the safety or health of the employee, coworkers or the public or damage to  
9           property.

10          **3-D. Impairment or impaired.** "Impairment" means any observed abnormality or  
11          change in an employee's physical, psychological or physiological condition or an event in  
12          the workplace that could reasonably lead to the conclusion that the employee may behave  
13          or perform tasks in a manner that threatens the safety of the employee, the employee's  
14          coworkers or any other individuals. "Impaired" means acting under the influence of an  
15          impairment.

16          **3-E. Medical review officer.** "Medical review officer" means a licensed physician  
17          knowledgeable of, and with clinical experience in, controlled substance abuse disorders,  
18          deviations of substance use testing specimens and causes of invalid testing results, who is  
19          responsible for receiving and reviewing laboratory results generated by an employer's  
20          drug testing program and evaluating medical explanations for certain drug test results.  
21          "Medical review officer" includes a person qualified to serve as a medical review officer  
22          under federal drug testing laws, as long as that person meets the requirements of this  
23          subsection.

24          **Sec. 6. 26 MRSA §682, sub-§4-A** is enacted to read:

25          **4-A. Occupational health care provider.** "Occupational health care provider"  
26          means an occupational medicine specialist with a wide knowledge of clinical medicine  
27          who has competencies in areas such as employee work-related injury management,  
28          periodic regulatory medical evaluations for specific job roles, fitness-for-duty evaluations  
29          of non-work-related employee conditions and evaluation of other employment-related  
30          medical concerns. "Occupational health care provider" includes a physician, physician  
31          assistant or nurse practitioner or other similar medical professional trained in  
32          occupational health care. An occupational health care provider may have knowledge of  
33          the specific nature of the employment functions performed by employees for the specific  
34          employer.

35          **Sec. 7. 26 MRSA §682, sub-§6**, as enacted by PL 1989, c. 536, §§1 and 2 and  
36          affected by c. 604, §§2 and 3, is repealed.

37          **Sec. 8. 26 MRSA §682, sub-§§6-A to 6-C** are enacted to read:

38          **6-A. Random testing.** "Random testing" means a method of selecting those to be  
39          tested in which all persons potentially to be tested have an equal probability of selection  
40          by chance.

1 **6-B. Return-to-work agreement.** "Return-to-work agreement" means a written  
2 document that sets forth the expectations that the employer and the employer's employee  
3 assistance program or a medical professional have of an employee who has completed  
4 mandated treatment for substance abuse problems. It also sets forth the consequences if  
5 the expectations are not met.

6 **6-C. Safety-sensitive task or occupation.** "Safety-sensitive task or occupation"  
7 means a work task or an employee occupation that, based on its nature, machinery,  
8 location, surroundings or influence upon other operations, could pose a threat to the  
9 safety of the employee, a coworker or others.

10 **Sec. 9. 26 MRSA §682, sub-§7**, as amended by PL 2009, c. 133, §1, is further  
11 amended to read:

12 **7. Substance use test.** "Substance ~~abuse~~ use test" means any test procedure  
13 designed to take and analyze body fluids or materials from the body for the purpose of  
14 detecting the presence of substances of abuse. The term does not include tests designed  
15 to determine blood-alcohol concentration levels from a sample of an individual's breath.

16 A. "Screening test" means an initial substance ~~abuse~~ use test performed through the  
17 use of immunoassay technology or a federally recognized substance ~~abuse~~ use test, or  
18 a test technology of similar or greater accuracy and reliability approved by the  
19 Department of Health and Human Services under rules adopted under section 687,  
20 and that is used as a preliminary step in detecting the presence of substances of abuse.

21 (1) A screening test of an applicant's urine or saliva may be performed at the  
22 point of collection through the use of a noninstrumented point of collection test  
23 device approved by the federal Food and Drug Administration. Section 683,  
24 subsection 5-A governs the use of such tests.

25 B. "Confirmation test" means a 2nd substance ~~abuse~~ use test that is used to verify the  
26 presence of a substance of abuse indicated by an initial positive screening test result  
27 and is a federally recognized substance ~~abuse~~ use test or is performed through the use  
28 of liquid or gas chromatography-mass spectrometry.

29 C. "Federally recognized substance ~~abuse~~ use test" means any substance ~~abuse~~ use  
30 test recognized by the federal Food and Drug Administration as accurate and reliable  
31 through the administration's clearance or approval process, a substance use test  
32 conducted in accordance with mandated guidelines for federal workplace drug testing  
33 programs or a substance use test conducted according to protocols and levels  
34 established by the United States Department of Health and Human Services,  
35 Substance Abuse and Mental Health Services Administration.

36 **Sec. 10. 26 MRSA §683**, as amended by PL 2011, c. 657, Pt. AA, §72, is further  
37 amended to read:

38 **§683. Testing procedures**

39 ~~No~~ An employer may not require, request or suggest that any employee or applicant  
40 submit to a substance ~~abuse~~ use test except in compliance with this section. All actions  
41 taken under a substance ~~abuse~~ use testing program ~~shall~~ must comply with this

1 subchapter, rules adopted under this subchapter and the ~~employer's written uniform~~  
2 ~~impairment and substance use testing policy approved under section 686~~ developed by  
3 the Department of Labor pursuant to subsection 2.

4 **1. Employee assistance program optional.** ~~Before establishing any substance~~  
5 ~~abuse testing program for employees, an~~ An employer with over 20 full-time employees  
6 ~~must~~ may have a functioning an employee assistance program.

7 A. ~~The~~ An employer may ~~meet this requirement by participating~~ participate in a  
8 cooperative employee assistance program that serves the employees of more than one  
9 employer.

10 ~~B. The employee assistance program must be certified by the Department of Health~~  
11 ~~and Human Services under rules adopted pursuant to section 687. The rules must~~  
12 ~~ensure that the employee assistance programs have the necessary personnel, facilities~~  
13 ~~and procedures to meet minimum standards of professionalism and effectiveness in~~  
14 ~~assisting employees.~~

15 **2. Uniform impairment and substance use testing policy.** ~~Before establishing any~~  
16 ~~substance abuse testing program, an employer must develop or, as required in section~~  
17 ~~684, subsection 3, paragraph C, must appoint an employee committee to develop a~~  
18 ~~written policy in compliance with this subchapter providing for~~ On or before January 1,  
19 2019, the Department of Labor shall adopt by rule a uniform impairment and substance  
20 use testing policy for adoption by employers. Before establishing any new substance use  
21 testing program or reactivating an inactive substance use testing policy after January 1,  
22 2019, an employer shall certify to the department that it has adopted the uniform  
23 impairment and substance use testing policy as set forth in department rules and that it  
24 will carry out all substance use testing activities that are not regulated by the Federal  
25 Government in accordance with that policy. An employer with an active substance use  
26 testing policy approved prior to January 1, 2019 may continue to operate under that  
27 policy but shall certify to the department by no later than January 1, 2020 that the  
28 employer has adopted the uniform impairment and substance use testing policy. The  
29 uniform impairment and substance use testing policy developed by the department must  
30 provide, at a minimum:

31 A. The procedure and consequences of an employee's voluntary admission of a  
32 substance abuse problem and any available assistance, including the availability and  
33 procedure of the employer's employee assistance program;

34 B. When substance ~~abuse~~ use testing may occur. The ~~written~~ policy must describe:

35 (1) Which positions, if any, will be subject to testing, including any positions  
36 subject to random or arbitrary testing under section 684, subsection 3. For  
37 applicant testing and ~~probable-cause~~ testing of employees, an employer may  
38 designate that all positions are subject to testing; and

39 (2) The procedure to be followed in selecting employees to be tested on a  
40 random or arbitrary basis under section 684, subsection 3;

41 C. ~~The~~ For the collection of samples.



- 1 (1) The collection of any sample for use in a substance ~~abuse~~ use test must be  
2 conducted in a medical facility and supervised by a licensed physician or nurse.  
3 A medical facility includes a first aid station located at the work site.
- 4 (2) An employer may not require an employee or applicant to remove any  
5 clothing for the purpose of collecting a urine sample, except that:
- 6 (a) An employer may require that an employee or applicant leave any  
7 personal belongings other than clothing and any unnecessary coat, jacket or  
8 similar outer garments outside the collection area; ~~or.~~
- 9 ~~(b) If it is the standard practice of an off-site medical facility to require the~~  
10 ~~removal of clothing when collecting a urine sample for any purpose, the~~  
11 ~~physician or nurse supervising the collection of the sample in that facility~~  
12 ~~may require the employee or applicant to remove their clothing.~~
- 13 (3) ~~No~~ An employee or applicant may not be required to provide a urine sample  
14 while being observed, directly or indirectly, by another individual.
- 15 (4) The employer may take additional actions necessary to ensure the integrity of  
16 a urine sample if the sample collector or testing laboratory determines that the  
17 sample may have been substituted, adulterated, diluted or otherwise tampered  
18 with in an attempt to influence test results. The Department of Health and  
19 Human Services shall adopt rules governing when those additional actions are  
20 justified and the scope of those actions. These rules may not permit the direct or  
21 indirect observation of the collection of a urine sample. If an employee or  
22 applicant is found to have twice substituted, adulterated, diluted or otherwise  
23 tampered with the employee's or applicant's urine sample, as determined under  
24 the rules adopted by the department, the employee or applicant is deemed to have  
25 refused to submit to a substance ~~abuse~~ use test.
- 26 (5) If the employer proposes to use the type of screening test described in section  
27 682, subsection 7, paragraph A, subparagraph (1), the ~~employer's~~ policy must  
28 include:
- 29 (a) Procedures to ensure the confidentiality of test results as required in  
30 section 685, subsection 3; and
- 31 (b) Procedures for training persons performing the test in the proper manner  
32 of collecting samples and reading results, maintaining a proper chain of  
33 custody and complying with other applicable provisions of this subchapter;
- 34 D. ~~The~~ Procedures for the storage of samples before testing sufficient to inhibit  
35 deterioration of the sample;
- 36 E. The chain of custody of samples sufficient to protect the sample from tampering  
37 and to verify the identity of each sample and test result;
- 38 F. The substances of abuse to be tested for;
- 39 G. The cutoff levels for ~~both screening and~~ confirmation tests at which the presence  
40 of a substance of abuse in a sample is considered a confirmed positive test result.

1 (1) Cutoff levels for confirmation tests for marijuana may not be lower than 15  
2 nanograms of delta-9-tetrahydrocannabinol-9-carboxylic acid per milliliter for  
3 urine samples.

4 (2) The Department of Health and Human Services shall adopt rules under  
5 section 687 regulating screening and confirmation cutoff levels for other  
6 substances of abuse, including those substances tested for in blood samples under  
7 subsection 5, paragraph B, to ensure that levels are set within known tolerances  
8 of test methods and above mere trace amounts. An employer may request that  
9 the Department of Health and Human Services establish a cutoff level for any  
10 substance of abuse for which the department has not established a cutoff level.

11 (3) Notwithstanding subparagraphs (1) and (2), if the Department of Health and  
12 Human Services does not have established cutoff levels or procedures for any  
13 specific federally recognized substance ~~abuse~~ use test, the minimum cutoff levels  
14 and procedures that apply are those set forth in the Federal Register, Volume 69,  
15 No. 71, sections 3.4 to 3.7 on pages 19697 and 19698, in mandated guidelines for  
16 federal workplace drug testing programs or in the protocols and levels established  
17 by the United States Department of Health and Human Services, Substance  
18 Abuse and Mental Health Services Administration;

19 H. The consequences of a confirmed positive substance ~~abuse~~ use test result;

20 I. The consequences for refusal to submit to a substance ~~abuse~~ use test;

21 J. Opportunities and procedures for ~~rehabilitation treatment~~ following a confirmed  
22 positive substance use test result;

23 K. A procedure under which an employee or applicant who receives a confirmed  
24 positive substance use test result may appeal and contest the accuracy of that result.  
25 The policy must include a mechanism that provides an opportunity to appeal at no  
26 cost to the appellant; and

27 L. Any other matters required by rules adopted by the Department of Labor under  
28 section 687.

29 ~~An employer must consult with the employer's employees in the development of any~~  
30 ~~portion of a substance abuse testing policy under this subsection that relates to the~~  
31 ~~employees. The employer is not required to consult with the employees on those portions~~  
32 ~~of a policy that relate only to applicants. The employer shall send a copy of the final~~  
33 ~~written policy to the Department of Labor for review under section 686. The employer~~  
34 ~~may not implement the policy until the Department of Labor approves the policy. The~~  
35 ~~employer shall send a copy of any proposed change in an approved written policy to the~~  
36 ~~Department of Labor for review under section 686. The employer may not implement the~~  
37 ~~change until the Department of Labor approves the change.~~

38 **3. Copies to employees and applicants.** The employer shall provide each employee  
39 with notice of and an opportunity to review a copy of the ~~written policy approved by the~~  
40 ~~Department of Labor under section 686~~ uniform impairment and substance use testing  
41 policy adopted pursuant to subsection 2 at least 30 days before any portion of the ~~written~~  
42 ~~policy applicable to employees takes effect. The employer shall provide each employee~~  
43 ~~with a copy of any change in a written policy approved by the Department of Labor under~~

1 section 686 at least 60 days before any portion of the change applicable to employees  
2 takes effect. The Department of Labor may waive the 60 day notice for the  
3 implementation of an amendment covering employees if the amendment was necessary to  
4 comply with the law or if, in the judgment of the department, the amendment promotes  
5 the purpose of the law and does not lessen the protection of an individual employee. If an  
6 employer intends to test an applicant, the employer shall provide the applicant with an  
7 opportunity to review a copy of the written uniform policy ~~under subsection 2~~ before  
8 administering a substance ~~abuse~~ use test to the applicant. The 30-day ~~and 60-day~~ notice  
9 ~~periods~~ period provided for employees under this subsection ~~do~~ does not apply to  
10 applicants.

11 **4. Consent forms prohibited.** An employer may not require, request or suggest that  
12 ~~any~~ an employee or applicant sign or agree to any form or agreement that attempts to:

13 A. Absolve the employer from any potential liability arising out of the imposition of  
14 the substance ~~abuse~~ use test; or

15 B. Waive an employee's or applicant's rights or eliminate or diminish an employer's  
16 obligations under this subchapter except as provided in subsection 4-A.

17 Any form or agreement prohibited by this subsection is void.

18 **4-A. Waivers for temporary employment.** An employment agency, as defined in  
19 section 611, may request a written waiver for a temporary placement from an individual  
20 already in its employ or on a roster of eligibility as long as the client company has ~~an~~  
21 approved adopted the uniform impairment and substance ~~abuse~~ use testing policy in  
22 accordance with subsection 2 and the individual has not been assigned work at the client  
23 company in the 30 days previous to the request. The waiver is only to allow a test that  
24 might not otherwise be allowed under this subchapter. The test must otherwise comply  
25 with the standards of this subchapter and the ~~employment agency's approved~~ uniform  
26 policy regarding applicant testing. The agency may not take adverse action against the  
27 individual for refusal to sign a waiver.

28 **5. Right to obtain other samples.** ~~At the request of the employee or applicant at the~~  
29 ~~time the test sample is taken, the employer shall, at that time:~~

30 A. Segregate a portion of the sample for that person's own testing. Within 5 days  
31 after notice of the test result is given to the employee or applicant, the employee or  
32 applicant shall notify the employer of the testing laboratory selected by the employee  
33 or applicant. This laboratory must comply with the requirements of this section  
34 related to testing laboratories. When the employer receives notice of the employee or  
35 applicant's selection, the employer shall promptly send the segregated portion of the  
36 sample to the named testing laboratory, subject to the same chain of custody  
37 requirements applicable to testing of the employer's portion of the sample. The  
38 employee or applicant shall pay the costs of these tests. Payment for these tests may  
39 not be required earlier than when notice of the choice of laboratory is given to the  
40 employer; and

41 B. In the case of an employee, have a blood sample taken from the employee by a  
42 licensed physician, registered physician's assistant, registered nurse or a person  
43 certified by the Department of Health and Human Services to draw blood samples.

1 The employer shall have this sample tested for the presence of alcohol or marijuana  
2 metabolites, if those substances are to be tested for under the ~~employer's written~~  
3 uniform impairment and substance use testing policy adopted pursuant to subsection  
4 2. If the employee requests that a blood sample be taken as provided in this  
5 paragraph, the employer may not test any other sample from the employee for the  
6 presence of these substances.

7 (1) The Department of Health and Human Services may identify, by rules  
8 adopted under section 687, other substances of abuse for which an employee may  
9 request a blood sample be tested instead of a urine sample if the department  
10 determines that a sufficient correlation exists between the presence of the  
11 substance in an individual's blood and its effect upon the individual's  
12 performance.

13 (2) ~~No~~ An employer may not require, request or suggest that any employee or  
14 applicant provide a blood sample for substance ~~abuse~~ use testing purposes nor  
15 may any employer conduct a substance ~~abuse~~ use test upon a blood sample  
16 except as provided in this paragraph.

17 (3) Applicants do not have the right to require the employer to test a blood  
18 sample as provided in this paragraph.

19 **5-A. Point of collection screening test.** Except as provided in this subsection, all  
20 provisions of this subchapter regulating screening tests apply to noninstrumented point of  
21 collection test devices described in section 682, subsection 7, paragraph A, subparagraph  
22 (1).

23 A. A noninstrumented point of collection test described in section 682, subsection 7,  
24 paragraph A, subparagraph (1) may be performed at the point of collection rather  
25 than in a laboratory. Subsections 6 and 7 and subsection 8, paragraphs A to C do not  
26 apply to such screening tests. Subsection 5 applies only to a sample that results in a  
27 positive test result.

28 B. Any sample that results in a negative test result must be destroyed. Any sample  
29 that results in a ~~positive~~ positive test result must be sent to a qualified testing  
30 laboratory consistent with subsections 6 to 8 for confirmation testing.

31 C. A person who performs a point of collection screening test or a confirmation test  
32 may release the results of that test only as follows.

33 (1) For a point of collection screening test that results in a preliminary positive  
34 or negative test result, the person performing the test shall release the test result  
35 to the employee who is the subject of the test immediately.

36 (2) For a point of collection screening test that results in a preliminary positive  
37 test result, the person performing the test may not release the test result to the  
38 employer until after the result of the confirmation test has been determined.

39 (3) For a point of collection screening test that results in a preliminary negative  
40 test result, the person performing the test may not release the test result to the  
41 employer until after the result of a confirmation test would have been determined  
42 if one had been performed.

1 (4) For a confirmation test, the person performing the test shall release the result  
2 immediately to the employee who is the subject of the test and to the employer.

3 **6. Qualified testing laboratories required.** ~~No~~ An employer may ~~not~~ perform any  
4 substance ~~abuse~~ use test administered to any of that employer's employees. An employer  
5 may perform screening tests administered to applicants if the employer's testing facilities  
6 comply with the requirements for testing laboratories under this subsection. Except as  
7 provided in subsection 5-A, any substance ~~abuse~~ use test administered under this  
8 subchapter must be performed in a qualified testing laboratory that complies with this  
9 subsection.

10 B. The laboratory must have written testing procedures and procedures to ensure a  
11 clear chain of custody.

12 C. The laboratory must demonstrate satisfactory performance in the proficiency  
13 testing program of the National Institute on Drug Abuse, the College of American  
14 Pathology or the American Association for Clinical Chemistry.

15 D. The laboratory must comply with rules adopted by the Department of Health and  
16 Human Services under section 687. These rules ~~shall~~ must ensure that:

17 (1) The laboratory possesses all licenses or certifications that the department  
18 finds necessary or desirable to ensure reliable and accurate test results;

19 (2) The laboratory follows proper quality control procedures, including, but not  
20 limited to:

21 (a) The use of internal quality controls during each substance ~~abuse~~ use test  
22 conducted under this subchapter, including the use of blind samples and  
23 samples of known concentrations ~~which~~ that are used to check the  
24 performance and calibration of testing equipment;

25 (b) The internal review and certification process for test results, including  
26 the qualifications of the person who performs that function in the testing  
27 laboratory; and

28 (c) Security measures implemented by the testing laboratory; and

29 (3) Other necessary and proper actions are taken to ensure reliable and accurate  
30 test results.

31 **7. Testing procedure.** A testing laboratory shall perform a screening test on each  
32 sample submitted by the employer for only those substances of abuse that the employer  
33 requests to be identified. If a screening test result is negative, no further test may be  
34 conducted on that sample. If a screening test result is positive, a confirmation test ~~shall~~  
35 must be performed on that sample. A testing laboratory shall retain all confirmed  
36 positive samples for one year in a manner that will inhibit deterioration of the samples  
37 and allow subsequent retesting. All other samples ~~shall~~ must be disposed of immediately  
38 after testing.

39 **8. Laboratory report of test results.** This subsection governs the reporting of test  
40 results.

- 1 A. A laboratory report of test results ~~shall~~ must, at a minimum, state:
- 2 (1) The name of the laboratory that performed the test or tests;
- 3 (2) Any confirmed positive results on any tested sample.
- 4 (a) Unless the employee or applicant consents, test results ~~shall~~ may not be
- 5 reported in numerical or quantitative form but ~~shall~~ must state only that the
- 6 test result was positive or negative. This division does not apply if the test or
- 7 the test results become the subject of any grievance procedure, administrative
- 8 proceeding or civil action.
- 9 (b) A testing laboratory and the employer ~~must~~ shall ensure that an
- 10 employee's unconfirmed positive screening test result cannot be determined
- 11 by the employer in any manner, including, but not limited to, the method of
- 12 billing the employer for the tests performed by the laboratory and the time
- 13 within which results are provided to the employer. This division does not
- 14 apply to test results for applicants;
- 15 (3) The sensitivity or cutoff level of the confirmation test; and
- 16 (4) Any available information concerning the margin of accuracy and precision
- 17 of the test methods employed.

18 The report ~~shall~~ may not disclose the presence or absence of evidence of any physical

19 or mental condition or of any substance other than the specific substances of abuse

20 that the employer requested to be identified. A testing laboratory shall retain records

21 of confirmed positive results in a numerical or quantitative form for at least 2 years.

22 B. The employer shall promptly notify the employee or applicant tested of the test

23 result. Upon request of an employee or applicant, the employer shall promptly

24 provide a legible copy of the laboratory report to the employee or applicant. Within 3

25 working days after notice of a confirmed positive test result, the employee or

26 applicant may submit information to the employer explaining or contesting the

27 results.

28 C. The testing laboratory shall send test reports for samples segregated at an

29 employee's or applicant's request under subsection 5, paragraph A, to both the

30 employer and the employee or applicant tested.

31 D. Every employer whose uniform impairment and substance use testing policy

32 certification is approved by the Department of Labor under section 686 shall annually

33 send to the department a compilation of the results of all substance ~~abuse~~ use tests

34 administered by that employer in the previous calendar year. This report ~~shall~~ must

35 provide separate categories for employees and applicants and ~~shall~~ must be presented

36 in statistical form so that ~~no~~ a person who was tested by that employer ~~can~~ cannot

37 be identified from the report. The report ~~shall~~ must include a separate category for any

38 tests conducted on a random or arbitrary basis under section 684, subsection 3.

39 E. Any laboratory-confirmed positive substance use test results must be reported to a

40 medical review officer. The medical review officer may be directly or indirectly

41 retained by the employer but shall act independently in carrying out any testing

42 reviews or recommendations. The medical review officer shall contact the employee

1 and, if necessary, the employee's physician to review each confirmed positive  
2 substance use test or any test found to be adulterated, substituted or otherwise invalid  
3 to determine whether there is, in the opinion of the medical review officer, a  
4 legitimate medical explanation for the result. An exchange between the employee  
5 and the medical review officer is not subject to doctor-patient relationship  
6 confidentiality, although the medical review officer shall protect the confidentiality of  
7 the drug testing information as otherwise provided in this chapter. The medical  
8 review officer may not disclose the presence or absence of any physical or mental  
9 condition of the employee, the presence or absence of any substances other than those  
10 allowed to be tested for under Department of Health and Human Services laboratory  
11 testing rules or the presence or absence of any substance for which there is a  
12 legitimate medical explanation.

13 **9. Costs.** The employer shall pay the costs of all substance ~~abuse~~ use tests to which  
14 the employer requires, requests or suggests that an employee or applicant submit. Except  
15 as provided in paragraph A, the employee or applicant shall pay the costs of any  
16 additional substance ~~abuse~~ use tests.

17 Costs of a substance ~~abuse~~ use test administered at the request of an employee under  
18 subsection 5, paragraph B, ~~shall~~ must be paid:

19 A. By the employer if the test results are negative for all substances of abuse tested  
20 for in the sample; and

21 B. By the employee if the test results in a confirmed positive result for any of the  
22 substances of abuse tested for in the sample.

23 **10. Limitation on use of tests.** An employer may administer substance ~~abuse~~ use  
24 tests to employees or applicants only for the purpose of discovering the use of any  
25 substance of abuse likely to cause impairment of the user or the use of any scheduled  
26 drug. ~~No~~ An employer may not have substance ~~abuse~~ use tests administered to an  
27 employee or applicant for the purpose of discovering any other information.

28 **11. Rules.** The Department of Health and Human Services shall adopt any rules  
29 under section 687 regulating substance ~~abuse~~ use testing procedures that it finds  
30 necessary or desirable to ensure accurate and reliable substance ~~abuse~~ use testing and to  
31 protect the privacy rights of employees and applicants.

32 **Sec. 11. 26 MRSA §684,** as amended by PL 2003, c. 547, §2, is further amended  
33 to read:

34 **§684. Imposition of tests**

35 **1. Testing of applicants.** An employer may require, request or suggest that an  
36 applicant submit to a substance ~~abuse~~ use test only if:

37 A. The applicant has been offered employment with the employer; or

38 B. The applicant has been offered a position on a roster of eligibility from which  
39 applicants will be selected for employment. The number of persons on this roster of

1 eligibility may not exceed the number of applicants hired by that employer in the  
2 preceding 6 months.

3 The offer of employment or offer of a position on a roster of eligibility may be  
4 conditioned on the applicant receiving a negative test result.

5 ~~2. Probable cause testing of employees.~~ An employer may require, request or  
6 suggest that an employee submit to a substance abuse test if the employer has probable  
7 cause to test the employee.

8 ~~A. The employee's immediate supervisor, other supervisory personnel, a licensed  
9 physician or nurse, or the employer's security personnel shall make the determination  
10 of probable cause.~~

11 ~~B. The supervisor or other person must state, in writing, the facts upon which this  
12 determination is based and provide a copy of the statement to the employee.~~

13 2-A. Impairment detection required; testing of employees. An employer may  
14 require, request or suggest that an employee submit to a substance use test, an impairment  
15 determination by an occupational health care provider, or both, only if the employer has  
16 made an impairment detection regarding the employee pursuant to this subsection.

17 A. Only supervisory, human resources or security personnel approved for  
18 impairment detection by the Department of Labor or a licensed physician or nurse  
19 may make an impairment detection regarding an individual employee.

20 B. The person making the impairment detection shall state in writing, on a form  
21 provided by the Department of Labor, the facts upon which the detection is based,  
22 and shall provide a copy of the completed form to the employee as soon as possible  
23 but no later than 24 hours from the time the detection is made. The completed  
24 impairment detection form must be provided to the employee prior to any substance  
25 use testing of that employee.

26 C. At least 2 weeks prior to conducting any impairment detection activities under  
27 this subsection, the employer must provide the Department of Labor with a list of all  
28 positions subject to impairment detection activities and notify employees by posting  
29 that list in a location accessible to all employees. The employer may amend the list  
30 as long as, at least 2 weeks prior to any impairment detection activities, employees  
31 whose positions are being added to the list are notified of their inclusion on the list,  
32 the amended list is posted in a location accessible to employees and the amended list  
33 is submitted to the department.

34 D. Subject to any limitation of the Maine Human Rights Act or any other state or  
35 federal law, there may be no cause of action against an employer for making and  
36 acting upon impairment detection in accordance with this subsection as long as the  
37 completed impairment detection form is provided to the employee and the  
38 impairment detection is based on the employer's good faith belief that the employee  
39 was impaired at work.

40 E. An impairment detection may not be based exclusively on:

41 (1) Information received from an anonymous informant; or



1           (2) Any information tending to indicate that an employee may have possessed or  
2           used a substance of abuse off duty, except when the employee is observed  
3           possessing or ingesting any substance of abuse while either on the employer's  
4           premises or in the proximity of the employer's premises during or immediately  
5           before the employee's working hours.

6           **2-B. Impairment determination; temporary removal.** If an impairment detection  
7           is made, the employer may immediately remove the employee, or temporary employee,  
8           from the workplace pending resolution of the impairment detection.

9           A. Any impairment detection must be confirmed through a medical review by an  
10           occupational health care provider prior to any further action by the employer based  
11           on the impairment determination. The occupational health care provider may require  
12           that the employee submit to testing for substances of abuse, including prescription  
13           medications, to assist in investigating and confirming the impairment detection. The  
14           occupational health care provider may perform a fitness-for-duty evaluation of the  
15           employee. The occupational health care provider may direct the employee to obtain  
16           further medical evaluation either by the employee's physician or by another licensed  
17           physician acceptable to the occupational health care provider.

18           B. Any substance use testing subsequent to an impairment detection confirmation  
19           must be done by an independent testing facility, and all screening and confirmatory  
20           test results must be delivered to the medical review officer for review according to  
21           section 683, subsection 8, paragraph E. The medical review officer shall provide the  
22           results to the occupational health care provider and may not provide the results to the  
23           employer. When an employer is using a substance use test only, the medical review  
24           officer shall provide the results to the employer. The presence of prescription  
25           medications may be tested for only when impairment detection has been made and  
26           only for the purpose of assisting the occupational health care provider in evaluating  
27           whether an employee is impaired and the cause of the impairment.

28           C. The occupational health care provider shall make the final determination of  
29           whether an employee was or is impaired, identify the cause of any impairment,  
30           determine whether the employee can continue to perform any safety-sensitive task or  
31           occupation and determine the impairment remediation program, if any, necessary to  
32           ensure that the impairment will not recur or will not adversely affect the safety of the  
33           employee, coworkers and other persons at the work site in the future. The  
34           occupational health care provider may also make further recommendations regarding  
35           the employee's ability to safely perform all assigned tasks, including requiring any  
36           remedial measures, which may include, without limitation, compliance with return-  
37           to-work agreements or a written agreement by the employee to schedule any  
38           necessary medications in a manner that will not lead to impairment on the job. A  
39           return-to-work agreement may be used if an employee has violated the established  
40           drug-free workplace policy and has been provided the opportunity to participate in  
41           treatment as a condition of continued employment or reemployment.

42           D. If the occupational health care provider finds that the employee was not impaired  
43           on the job or that any such impairment did not pose a safety risk and did not violate  
44           the employer's established drug-free workplace policy, the employer shall reinstate  
45           the employee to the employee's position.

1           E. If an impairment detection is made at a time when an occupational health care  
2           provider is not normally available for work, the employer may take any steps to  
3           remove the employee, and, prior to the employee's next scheduled work day, the  
4           employer may determine whether to allow the employee to return to work or to  
5           request an impairment determination or fitness-for-duty evaluation by the  
6           occupational health care provider.

7           An occupational health care provider who makes or acts upon an impairment  
8           determination in accordance with this subsection is not subject to a cause of action as  
9           long as the determination is based on the occupational health care provider's good faith,  
10          professional judgment. An occupational health care provider may not be an employee or  
11          agent of, or have any financial interest in, a testing laboratory for which the occupational  
12          health care provider is reviewing drug test results. An occupational health care provider  
13          may not derive any financial benefit by having an employer use a laboratory that may be  
14          construed as a potential conflict of interest.

15           **3. Random or arbitrary testing of employees.** ~~In addition to testing employees on~~  
16          ~~a probable cause basis under subsection 2, an~~ An employer may require, request or  
17          ~~suggest~~ that an employee submit to a substance ~~abuse~~ use test on a random or arbitrary  
18          basis if:

19           A. The employer and the employee have bargained for provisions in a collective  
20          bargaining agreement, either before or after the effective date of this subchapter, that  
21          provide for random or arbitrary testing of employees. A random or arbitrary testing  
22          program that would result from implementation of an employer's last best offer is not  
23          considered a provision bargained for in a collective bargaining agreement for  
24          purposes of this section;

25           B. The employee works in a position the nature of which ~~would create an~~  
26          ~~unreasonable~~ could pose a threat to the health or safety of the public or the  
27          employee's coworkers if the employee were ~~under the influence of~~ impaired by  
28          a substance of abuse. It is the intent of the Legislature that the requirements of this  
29          paragraph be narrowly construed; or

30           C. The employer has established a random or arbitrary testing program under this  
31          paragraph that applies to all employees, except as provided in subparagraph (4),  
32          regardless of position.

33                   (1) An employer may establish a testing program under this paragraph only if the  
34                  employer has ~~50~~ 10 or more employees who are not covered by a collective  
35                  bargaining agreement.

36                   (2) ~~The written policy required by section 683, subsection 2 with respect to a~~  
37                  ~~testing program under this paragraph must be developed by a committee of at~~  
38                  ~~least 10 of the employer's employees. The employer shall appoint members to~~  
39                  ~~the committee from a cross-section of employees who are eligible to be tested.~~  
40                  ~~The committee must include a medical professional who is trained in procedures~~  
41                  ~~for testing for substances of abuse. If no such person is employed by the~~  
42                  ~~employer, the employer shall obtain the services of such a person to serve as a~~  
43                  ~~member of the committee created under this subparagraph.~~

1 (2-A) An employer may establish a random or arbitrary testing program under  
2 this paragraph if the employer is required to test employees to retain a contract.  
3 An employee may be allowed to sign a waiver exempting the employee from  
4 testing when required for a contract and the employee acknowledges that the  
5 employee may not have an opportunity to work under the contract for which  
6 testing is required.

7 ~~(3) The written policy developed under subparagraph (2) must also require that~~  
8 ~~selection of employees for testing be performed by a person or entity not subject~~  
9 ~~to the employer's influence, such as a medical review officer. Selection must be~~  
10 ~~made from a list, provided by the employer, of all employees subject to testing~~  
11 ~~under this paragraph. The list may not contain information that would identify the~~  
12 ~~employee to the person or entity making the selection.~~

13 (4) Employees who are covered by a collective bargaining agreement are not  
14 included in testing programs pursuant to this paragraph unless they agree to be  
15 included pursuant to a collective bargaining agreement as described under  
16 paragraph A.

17 ~~(5) Before initiating a testing program under this paragraph, the employer must~~  
18 ~~obtain from the Department of Labor approval of the policy developed by the~~  
19 ~~employee committee, as required in section 686. If the employer does not~~  
20 ~~approve of the written policy developed by the employee committee, the~~  
21 ~~employer may decide not to submit the policy to the department and not to~~  
22 ~~establish the testing program. The employer may not change the written policy~~  
23 ~~without approval of the employee committee.~~

24 ~~(6) The employer may not discharge, suspend, demote, discipline or otherwise~~  
25 ~~discriminate with regard to compensation or working conditions against an~~  
26 ~~employee for participating or refusing to participate in an employee committee~~  
27 ~~created pursuant to this paragraph.~~

28 (7) An arbitrary test may be conducted only on an employee whose job is of a  
29 nature that could pose a threat to the health or safety of the public or coworkers if  
30 the employee were impaired by a substance of abuse.

31 **4. Testing while undergoing treatment.** While the employee is participating in a  
32 substance abuse rehabilitation treatment program either as a result of voluntary contact  
33 with or ~~mandatory~~ a referral to the employer's employee assistance program or after a  
34 confirmed positive test result as provided in section 685, subsection 2, paragraphs B and  
35 C, substance abuse use testing may be conducted by the ~~rehabilitation~~ or treatment  
36 provider as required, requested or suggested by that provider.

37 A. Substance abuse use testing conducted as part of such a ~~rehabilitation~~ or treatment  
38 program is not subject to the provisions of this subchapter regulating substance abuse  
39 use testing.

40 B. An employer may not require, request or suggest that any substance abuse use test  
41 be administered to ~~any~~ an employee while the employee is undergoing such  
42 ~~rehabilitation~~ or treatment, except as provided in subsections 2 2-A and 3.

1 C. The results of any substance ~~abuse~~ use test administered to an employee as part of  
2 such a ~~rehabilitation~~ or treatment program may not be released to the employer.

3 **5. Testing upon return to work.** If an employee who has received a confirmed  
4 positive test result returns to work with the same employer, whether or not the employee  
5 has participated in a ~~rehabilitation~~ treatment program under section 685, subsection 2, the  
6 employer may require, request or suggest that the employee submit to a subsequent  
7 substance ~~abuse~~ use test ~~anytime~~ any time between 90 days and one year after the date of  
8 the employee's prior test. A test may be administered under this subsection in addition to  
9 any tests conducted under subsections ~~2~~ 2-A and 3. An employer may require, request or  
10 suggest that an employee submit to a substance ~~abuse~~ use test during the first 90 days  
11 after the date of the employee's prior test only as provided in subsections ~~2~~ 2-A and 3.

12 **Sec. 12. 26 MRSA §685**, as amended by PL 2003, c. 547, §3, is further amended  
13 to read:

14 **§685. Action taken on substance use tests**

15 Action taken by an employer on the basis of a substance ~~abuse~~ use test is limited as  
16 provided in this section.

17 **1. Before receipt of test results.** An employer may suspend an employee with full  
18 pay and benefits or may transfer the employee to another position with no reduction in  
19 pay or benefits while awaiting an employee's test results.

20 **2. Use of confirmation test results.** This subsection governs an employer's use of  
21 confirmed positive test results and an employee's or applicant's refusal to submit to a test  
22 requested or required by an employer in compliance with this subchapter.

23 A. Subject to any limitation of the Maine Human Rights Act or any other state law or  
24 federal law; and to provisions in this subsection, an employer may use a confirmed  
25 positive test result ~~or for a substance of abuse~~, refusal to submit to a substance use  
26 test, a violation of an established drug-free workplace policy or an impairment  
27 confirmed by an occupational health care provider pursuant to section 684,  
28 subsection 2-B as a factor in any of the following decisions:

- 29 (1) Refusal to hire an applicant for employment or refusal to place an applicant  
30 on a roster of eligibility;
- 31 (2) Discharge of an employee;
- 32 (3) Discipline of an employee; or
- 33 (4) Change in the employee's work assignment.

34 A-1. An employer who tests a person as an applicant and employs that person prior  
35 to receiving the test result may take no action on a confirmed positive test result  
36 except in accordance with the employee provisions of the ~~employer's approved~~  
37 uniform impairment and substance use testing policy adopted pursuant to section 683,  
38 subsection 2.

1 B. Before taking any action described in paragraph A in the case of an employee  
2 who receives an initial confirmed positive test result, an employer ~~shall~~ may provide  
3 the employee with an opportunity to participate for up to ~~6 months~~ 12 weeks in a  
4 ~~rehabilitation treatment~~ program designed to enable the employee to avoid future use  
5 of a substance of abuse and to participate in an employee assistance program, if the  
6 employer has such a program. A confirmed impairment under section 684,  
7 subsection 2-B caused by a substance of abuse is the same as an initial confirmed  
8 positive test result for purposes of this paragraph, with or without a substance use test  
9 result. A treatment program under this paragraph may be provided by an  
10 occupational health care provider. Participation by an employee in a treatment  
11 program must begin within 30 days of the employee's receiving notice of the positive  
12 test result or confirmed impairment, unless otherwise agreed to by the employer. The  
13 employer may take any action described in paragraph A if the employee receives a  
14 subsequent confirmed positive test result from a substance use test administered by  
15 the employer under this subchapter or the employee receives a subsequent confirmed  
16 impairment caused by a substance of abuse with or without a substance use test.

17 C. If the employee chooses not to participate in a ~~rehabilitation treatment~~ program  
18 under this subsection, the employer may take any action described in paragraph A. If  
19 the employee chooses to participate in a ~~rehabilitation treatment~~ program, the  
20 following provisions apply.

21 (1) If the employer has an employee assistance program that offers counseling or  
22 ~~rehabilitation treatment~~ services, the employee may choose to enter that program  
23 ~~at the employer's expense with any costs not covered by the employer's portion of~~  
24 ~~the employee assistance program to be paid by the employee unless the employer~~  
25 ~~chooses to cover such costs.~~ If these services are not available from an  
26 employer's employee assistance program or if the employee chooses not to  
27 participate in that program, the employee may enter a public or private  
28 ~~rehabilitation treatment~~ program.

29 (a) Except to the extent that costs are covered by a group health insurance  
30 plan, the costs of the public or private ~~rehabilitation treatment~~ program must  
31 be ~~equally divided between the employer and employee if the employer has~~  
32 ~~more than 20 full-time employees. This requirement does not apply to~~  
33 ~~municipalities or other political subdivisions of the State or to any employer~~  
34 ~~when the employee is tested because of the alcohol and controlled substance~~  
35 ~~testing mandated by the federal Omnibus Transportation Employee Testing~~  
36 ~~Act of 1991, Public Law 102-143, Title V. If necessary, the paid by the~~  
37 ~~employee. The employer shall may assist in financing the cost share of the~~  
38 ~~employee employee's costs~~ through a payroll deduction plan.

39 (b) Except to the extent that costs are covered by a group health insurance  
40 plan, ~~an employer with 20 or fewer full-time employees, a municipality or~~  
41 ~~other political subdivision of the State is not required to pay for any costs of~~  
42 ~~rehabilitation or treatment under any public or private rehabilitation treatment~~  
43 ~~program. An employer is not required to pay for the costs of rehabilitation~~  
44 ~~treatment if the employee was tested because of the alcohol and controlled~~  
45 ~~substance testing mandated by the federal Omnibus Transportation Employee~~  
46 ~~Testing Act of 1991, Public Law 102-143, Title V.~~

1 (2) ~~No~~ An employer may not take any action described in paragraph A while an  
2 employee is participating in a rehabilitation treatment program, except as  
3 provided in subparagraph (2-A) and except that an employer may change the  
4 employee's work assignment or suspend the employee from active duty to reduce  
5 any possible safety hazard. Except as provided in subparagraph (2-A), an  
6 employee's pay or benefits may not be reduced while an employee is participating  
7 in a rehabilitation treatment program, ~~provided~~ except that the employer is not  
8 required to pay the employee for periods in which the employee is unavailable  
9 for work for the purposes of rehabilitation treatment or while the employee is  
10 medically disqualified. The employee may apply ~~normal sick leave and or~~  
11 vacation time leave, if any available, for these periods or available family  
12 medical leave for which the employee may qualify under state or federal law.

13 (2-A) A ~~rehabilitation or~~ treatment provider shall promptly notify the employer  
14 if the employee fails to comply with the prescribed rehabilitation treatment  
15 program before the expiration of the ~~6-month~~ 12-week period provided in  
16 paragraph B. Upon receipt of this notice, the employer may take any action  
17 described in paragraph A.

18 (3) Except as provided in divisions (a) and (b), upon successfully completing the  
19 rehabilitation treatment program, as determined by the ~~rehabilitation or~~ treatment  
20 provider after consultation with the employer, the employee is entitled to return  
21 to the employee's previous job with full pay and benefits unless conditions  
22 unrelated to the employee's previous confirmed positive test result make the  
23 employee's return impossible. Reinstatement of the employee ~~must~~ may not  
24 conflict with any provision of a collective bargaining agreement between the  
25 employer and a labor organization that is the collective bargaining representative  
26 of the unit of which the employee is or would be a part. If the ~~rehabilitation or~~  
27 treatment provider determines that the employee has not successfully completed  
28 the rehabilitation treatment program within ~~6~~ 4 months after starting the program,  
29 the employer may take any action described in paragraph A.

30 (a) If the employee who has completed rehabilitation treatment previously  
31 worked in an employment position subject to random or arbitrary testing  
32 under an employer's written policy, the employer may refuse to allow the  
33 employee to return to the previous job if the employer believes that the  
34 employee may pose an unreasonable safety hazard because of the nature of  
35 the position. The employer shall attempt to find suitable work for the  
36 employee immediately after refusing the employee's return to the previous  
37 position. No reduction may be made in the employee's previous benefits or  
38 rate of pay while awaiting reassignment to work or while working in a  
39 position other than the previous job. The employee ~~shall~~ must be reinstated  
40 to the previous position or to another position with an equivalent rate of pay  
41 and benefits and with no loss of seniority within 6 months after returning to  
42 work in any capacity with the employer unless the employee has received a  
43 subsequent confirmed positive test result within that time from a test  
44 administered under this subchapter or unless conditions unrelated to the  
45 employee's previous confirmed positive test result make that reinstatement or  
46 reassignment impossible. Placement of the employee in suitable work and

1 reinstatement may not conflict with any provision of a collective bargaining  
2 agreement between the employer and a labor organization that is the  
3 collective bargaining representative of the unit of which the employee is or  
4 would be a part.

5 (b) Notwithstanding division (a), if an employee who has successfully  
6 completed ~~rehabilitation~~ treatment is medically disqualified, the employer is  
7 not required to reinstate the employee or find suitable work for the employee  
8 during the period of disqualification. The employer is not required to  
9 compensate the employee during the period of disqualification. Immediately  
10 after the employee's medical disqualification ceases, the employer's  
11 obligations under division (a) attach as if the employee had successfully  
12 completed ~~rehabilitation~~ treatment on that date.

13 D. This subsection does not require an employer to take any disciplinary action  
14 against an employee who refuses to submit to a test, receives a single or repeated  
15 confirmed positive test result or does not choose to participate in a ~~rehabilitation~~  
16 treatment program. ~~This subsection is intended to set minimum opportunities for an~~  
17 ~~employee with a substance abuse problem to address the problem through~~  
18 ~~rehabilitation.~~ An employer may offer additional opportunities, not otherwise in  
19 violation of this subchapter, for ~~rehabilitation~~ treatment or continued employment  
20 without ~~rehabilitation~~ treatment.

21 **3. Confidentiality.** This subsection governs the use of information acquired by an  
22 employer in the testing process.

23 A. Unless the employee or applicant consents, all information acquired by an  
24 employer in the testing process is confidential and may not be released to any person  
25 other than the employee or applicant who is tested, any necessary personnel of the  
26 employer and a provider of ~~rehabilitation~~ or treatment services under subsection 2,  
27 paragraph C. This paragraph does not prevent:

- 28 (1) The release of this information when required or permitted by state or federal  
29 law, including release under section 683, subsection 8, paragraph D; or
- 30 (2) The use of this information in any grievance procedure, administrative  
31 hearing or civil action relating to the imposition of the test or the use of test  
32 results.

33 B. Notwithstanding any other law, the results of any substance ~~abuse~~ use test  
34 required, requested or suggested by any employer may not be used in any criminal  
35 proceeding.

36 **Sec. 13. 26 MRSA §686**, as amended by PL 2009, c. 133, §3, is further amended  
37 to read:

38 **§686. Review of uniform impairment and substance use testing policy certification**

39 **1. Review required.** The Department of Labor shall review each ~~written policy or~~  
40 ~~change to an approved~~ certification of adoption of the uniform impairment and substance  
41 use testing policy submitted to the department by an employer under section 683,  
42 subsection 2.

1 A. The department shall determine if the employer's ~~written policy or change~~  
2 ~~complies with this subchapter and shall immediately notify the employer who~~  
3 ~~submitted the policy or change of that determination~~ certification of adoption of the  
4 uniform impairment and substance use testing policy is complete. If the department  
5 finds that the ~~policy or change does not comply with this subchapter~~ employer's  
6 certification is incomplete, the department shall also notify the employer of the  
7 ~~specific areas in which the policy or change is defective~~ defects. If the employer's  
8 certification is determined to be complete, the department shall approve the  
9 conducting of substance use testing by the employer in accordance with this  
10 subchapter and shall notify the employer of this approval.

11 ~~B. The department may request additional information from an employer when~~  
12 ~~necessary to determine whether an employment position meets the requirements of~~  
13 ~~section 684, subsection 3. The department shall not approve any written policy that~~  
14 ~~provides for random or arbitrary testing of any employment position that the~~  
15 ~~employer has failed to demonstrate meets the requirements of section 684, subsection~~  
16 ~~3.~~

17 C. The department shall allow for the use of any federally recognized substance  
18 abuse use test.

19 **2. Review procedure.** The Department of Labor shall adopt rules under section 687  
20 governing the procedure for reviews conducted under this section.

21 A. The rules must provide for notice to be given to the employees of any employer  
22 who submits a ~~written~~ certification of adoption of the uniform impairment and  
23 substance use testing policy under section 683, subsection 2 or an amendment  
24 applicable to employees to the department for review under this section. The  
25 employees may submit written comments to the department challenging ~~any portion~~  
26 ~~of the employer's written policy, including the proposed designation of any position~~  
27 under section 684, subsection 3, paragraph B.

28 B. Nothing in this section requires a formal hearing to be held concerning the  
29 submission and review of an employer's ~~written certification of adoption of the~~  
30 uniform impairment and substance use testing policy under section 683, subsection 2.

31 C. Notwithstanding Title 5, section 8003, the Maine Administrative Procedure Act,  
32 Title 5, chapter 375, does not apply to reviews conducted under this section except  
33 that all determinations by the Department of Labor under this section may be  
34 appealed as provided in Title 5, chapter 375, subchapter ~~VH~~ 7.

35 D. The rules may ~~establish model applicant policies and employee probable cause~~  
36 ~~policies and provide for expedited approval and registration for employers adopting~~  
37 ~~such model policies~~ the uniform impairment and substance use testing policy under  
38 section 683, subsection 2. The rules adopted under this paragraph are routine  
39 technical rules pursuant to Title 5, chapter 375, subchapter ~~H-A~~ 2-A.

40 **Sec. 14. 26 MRSA §689, sub-§3,** as enacted by PL 1989, c. 536, §§1 and 2 and  
41 affected by c. 604, §§2 and 3, is amended to read:



1           **3. Harassment.** In addition to the liability imposed under subsection 1, any  
2 employer who requires or repeatedly attempts to require an employee or applicant to  
3 submit to a substance ~~abuse~~ use test under conditions that would not justify the test under  
4 this subchapter or who without substantial justification repeatedly requires an employee  
5 to submit to a substance ~~abuse~~ use test under section 684, subsection 3:

6           A. Is subject to a civil penalty not to exceed \$1,000, payable to the affected  
7 employee, to be recovered in a civil action; and

8           B. For any subsequent offense against the same employee, is subject to a civil  
9 penalty of \$2,000, payable to the affected employee, to be recovered in a civil action.

10           **Sec. 15. 26 MRSA §689, sub-§5** is enacted to read:

11           **5. Civil violation.** In addition to the other remedies provided in this section, an  
12 employer who does not comply with this subchapter commits a civil violation for which  
13 the following fines may be adjudged:

14           A. For the first violation, not more than \$500;

15           B. For the 2nd violation, not more than \$750; and

16           C. For the 3rd violation and each subsequent violation, not more than \$1,000.

17           **Sec. 16. 26 MRSA §690**, as enacted by PL 1989, c. 536, §§1 and 2 and affected  
18 by c. 604, §§2 and 3, is amended to read:

19           **§690. Report**

20           The Department of Labor shall report to the joint standing committee of the  
21 Legislature having jurisdiction over labor matters on March 1, 1990, and annually on that  
22 date thereafter. This report ~~shall~~ must:

23           **1. List of employers.** List those employers whose substance ~~abuse~~ use testing  
24 policies have been approved by the Department of Labor under section 686;

25           **2. Persons tested.** Indicate whether those employers listed under subsection 1 are  
26 testing applicants or employees, or both;

27           **3. Random or arbitrary testing.** Indicate those employers whose substance ~~abuse~~  
28 use testing policies permit random or arbitrary testing under section 684, subsection 3,  
29 and describe the employment positions subject to such random or arbitrary testing;

30           **4. Results.** Provide statistical data relating to the reports received from employers  
31 indicating the number of substance ~~abuse~~ use tests administered by those employers in  
32 the previous calendar year and the results of those tests; and

33           **5. Description.** Briefly describe the general scope and practice of workplace  
34 substance ~~abuse~~ use testing in the State.

35           **Sec. 17. Maine Revised Statutes headnote amended; revision clause.** In  
36 the Maine Revised Statutes, Title 26, chapter 7, subchapter 3-A, in the subchapter

1 headnote, the words "substance abuse testing" are amended to read "substance use  
2 testing" and the Revisor of Statutes shall implement this revision when updating,  
3 publishing or republishing the statutes.

#### 4 **SUMMARY**

5 This bill makes changes to the laws governing employment practices concerning  
6 substance abuse testing, including the following.

7 1. It replaces the phrases "substance abuse test" and "substance abuse testing" with  
8 "substance use test" and "substance use testing" to reflect current usage.

9 2. It repeals a section of law that addresses nuclear power plants since there are no  
10 operating nuclear power plants in this State.

11 3. It narrows the definition of "employee" and provides that a full-time employee is  
12 an employee who works at least 36 hours a week.

13 4. It authorizes an employer that has employees subject to a federally mandated  
14 substance use testing program to extend federal drug testing activities to its entire  
15 workforce in order to maintain a single testing program and specifies that the employer  
16 must prepare a substance use testing plan for employees who are not federally regulated,  
17 provide a copy of the plan to the employees and the Department of Labor before testing,  
18 follow federal notification and procedural protocols for such employees and annually  
19 report the results of testing to the department.

20 5. It streamlines the current substance use testing policy approval by requiring the  
21 Department of Labor to develop a uniform impairment and substance use testing policy  
22 applicable to all employers. Employers must certify their adoption of the policy and be  
23 approved by the Department of Labor prior to conducting substance use testing.

24 6. It removes the "probable cause" standard and replaces it with an "impairment  
25 detection" standard required before the employer may conduct substance use testing. For  
26 employers authorized to conduct substance use testing, only an employer or employee  
27 approved for impairment detection by the Department of Labor or a licensed physician or  
28 nurse may make an impairment detection. This detection may be based on a single work-  
29 related accident, unlike the "probable cause" standard under current law. The employer  
30 may immediately remove the employee from the workplace pending resolution of the  
31 impairment detection.

32 7. It adds an "impairment determination" process that may be used as an alternative  
33 or in addition to a substance use test. Under this process, an occupational health care  
34 provider conducts a medical review in order to confirm the impairment detection, which  
35 may include a substance use test that includes testing for prescription drugs. If the  
36 impairment is confirmed, the employer may take employment action including firing or  
37 disciplining the employee, subject to any limitations under the Maine Human Rights Act  
38 and any other state or federal law. If the occupational health care provider finds that the  
39 employee was not impaired or that such impairment did not pose a safety risk, the  
40 employee is entitled to full reinstatement to the employee's position.

1           8. It adds a violation of an established drug-free workplace policy as grounds for  
2 employment action and provides for a treatment period of 12 weeks at the employee's  
3 expense.

4           9. It eliminates the requirement that, prior to establishing a substance use testing  
5 program, an employer with over 20 full-time employees have a functioning employee  
6 assistance program and instead authorizes employers to have an employee assistance  
7 program.

8           10. It expands the number of establishments that may undertake companywide  
9 random substance use testing by authorizing such testing for companies with 10 or more  
10 employees instead of with 50 or more employees, as is the current standard.

11           11. It provides that a confirmed positive substance use test may be reported to the  
12 employee only by a medical review officer and allows an employee to provide a  
13 legitimate medical explanation for a positive test result for legally obtained medications,  
14 preventing the medical review officer from reporting a positive test for that substance to  
15 the employer.

16           12. It allows testing laboratories to use federal testing standards.

17           13. It adds a new civil violation for any employer noncompliance with the substance  
18 use testing laws, for which a fine of not more than \$500 for the first violation, \$750 for  
19 the 2nd violation and \$1,000 for the 3rd and subsequent violations may be adjudged.